

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative  
Penalty Order Issued  
to Alan L. Wildman

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

- A hearing in this matter was held on April 26, 2002, at 9:30 a.m. at the Office of Administrative Hearings in Minneapolis, Minnesota before William J. Keppel, Administrative Law Judge. The record closed at the end of the hearing.

Jocelyn F. Olson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared representing the Environmental Health Division of the Minnesota Department of Health. Alan L. Wildman, 4550 Central Avenue, Space 1508, Columbia Heights, MN 55421, represented himself.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation. Under Minnesota Statutes Section 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this recommended decision to file exceptions and present argument to the Commissioner. Parties should contact Jan Malcolm, Commissioner, Department of Health, 85 East 7th Place, Suite 400, P.O. Box 64882, St. Paul, MN 55101 to ascertain the procedure for filing exceptions or presenting argument.

**STATEMENT OF ISSUE**

Whether the Department=s Combination Administrative Penalty Order assessing a total penalty of \$4,500 on Alan L. Wildman is reasonable considering the willfulness and gravity of the violation and other statutory factors, and if not, what penalty is appropriate.

Based upon all of the evidence and the hearing record, the Administrative Law Judge makes the following:

### FINDINGS OF FACT

1. On September 27, 2000, Alan L. Wildman, a licensed master plumber (sometimes referred to as Licensee), and Lori von Behren entered into a contract whereby Mr. Wildman agreed to provide plumbing services for a basement bathroom and kitchenette project at Ms. von Behren's home at 7039 Columbus Avenue South, Richfield, Minnesota, for a total price of \$2,750.<sup>[1]</sup> Pursuant to the terms of the contract, Ms. von Behren paid Mr. Wildman \$1,500 as a down payment that day.<sup>[2]</sup>

2. On September 28, 2000, Mr. Wildman, assisted by his son Alan Wildman Jr. and Sandy Simmons, commenced work on the project.<sup>[3]</sup> Mr. Wildman referred to his son as a journeyman plumber and to Ms. Simmons as his apprentice. Mr. Wildman directed and supervised their work. The rough-in plumbing work was substantially completed, and Mr. Wildman requested and Ms. von Behren paid him an additional \$1,300, the remainder of the contract amount plus \$50 for an extra item Mr. Wildman needed.<sup>[4]</sup>

3. On or about October 17, 2000, the floor drain backed up and continued to back up over the next week. Neither Mr. Wildman nor his son would return to the site to evaluate or remedy the situation. Mr. Wildman requested that Larry Jacques, who Wildman had recommended to do carpentry work on the project, install the toilet and sinks and attempt to remedy the situation. He or Ms. Simmons discovered that the Jacuzzi had not been hooked up.<sup>[5]</sup> The drain backup problem and the other defects remain unresolved as of the date of the hearing.

4. On October 24, 2000, Ms. von Behren filed a complaint regarding Mr. Wildman with the Minnesota Department of Health relating to possible Minnesota Plumbing Code violations.<sup>[6]</sup>

5. On October 30, 2000, a representative of the Minnesota Department of Health Plumbing Program inspected the site and observed the following six violations of the Minnesota Plumbing Code:<sup>[7]</sup>

Minnesota Rules, part 4715.0870: The bottom of the water closet floor flange was not set on the top of the finished floor or on a structurally firm base.

Minnesota Rules, part 4715.0920: The traps for the basement kitchen sink, lavatory whirlpool tub and water closet were not protected against siphonage and back pressure by means of properly installed vent pipes.

Minnesota Rules, part 4715.1000: The cleanout at the base of the existing soil stack was not easily accessible.

Minnesota Rules, part 4715.1730, subp. 1: Four plumbing fixtures were supplied by a one-half inch size potable water distribution pipe.

Minnesota Rules, part 4715.2420 subp. 1: The 1/4 bend drainage fitting under the closet flange was a heel inlet type.

Minnesota Rules, 4715.2830 and 4715.2800: No request was made for an inspection or air test prior to covering.

In addition, the Department's Inspector was informed that two other people had been working for the Licensee on the project.

6. In a newsletter issued in the Fall of 1999, the Department advised all Licensees that effective January 3, 2000, Administrative Penalty Orders would be issued to any master plumber or plumbing contractor who "has unregistered or unsupervised apprentices on site performing plumbing . . . No more verbal warnings or letters will be issued." In addition, the newsletter warned licensees that first-time violators "can expect monetary penalties as well as administrative actions."<sup>[8]</sup>

7. On November 9, 2000, the Minnesota Department of Health notified Mr. Wildman of the violations, directed that they be corrected within 10 working days, and requested the identification of his two assistants. The notification inadvertently listed the address of Ms. von Behren's home as 7030 (instead of 7039) Columbus Avenue South, Richfield.<sup>[9]</sup> On November 14, 2000, Mr. Wildman replied to the Department that he did not perform any work at 7030 Columbus Avenue South.<sup>[10]</sup>

8. Alerted to its error, on January 11, 2001, the Department sent an identical notification of violations letter to Mr. Wildman except that it referred to the proper address.<sup>[11]</sup> Mr. Wildman replied that he was "unable to locate any invoices concerning plumbing at 7039 Columbus Ave. So.", that no permits were issued for that job address, and that he had no employees, among other things.<sup>[12]</sup>

9. On August 29, 2001, the Department advised the Licensee that it had documentation that Alan Wildman Jr. and a woman named Sandy had assisted with the plumbing installation at the site. The Department requested a response regarding the accuracy of this information and the identity of Sandy.<sup>[13]</sup> Mr. Wildman responded "I do not have any employees."<sup>[14]</sup>

10. On November 1, 2001, the Department of Health held an administrative penalty forum to consider the alleged violations by the Licensee. The participants included the Supervisor of the Department's Plumbing Program, Gary Topp, and four other Department employees. The forum determined that all violations were serious, but that the penalties for violations of the Plumbing Code could be forgiven if the Licensee took timely corrective action. The penalty for using persons not registered with the Commissioner of Health as plumber's apprentices was both a Statutory and a

Code violation and was deemed nonforgivable. The forgivable penalties totaled \$3,000, and the unforgivable penalty was \$1,500, or a combined penalty of \$4,500.<sup>[15]</sup>

11. The penalty calculation was arrived at by following a plan adopted by the Department for the use of its administrative penalty authority.<sup>[16]</sup> The plan requires the Commissioner to consider the statutory penalty factors and states that in determining the gravity of a violation the Department will consider the extent of the deviation from compliance with the rule or statute violated by a regulated party, among other things. The plan classifies employing a person who does not have the appropriate license or registration as a serious violation which may be subject to a nonforgivable penalty.<sup>[17]</sup>

12. On December 5, 2001, the Department mailed a Combination Administrative Penalty Order to the Licensee. The Order assessed a forgivable penalty of \$3,000 and an nonforgivable penalty of \$1,500. The Order notified the Licensee that for the \$3,000 to be forgiven, a written response demonstrating compliance was due within 30 days of receiving the letter. The Order also advised Mr. Wildman of his right to appeal it by requesting a hearing before an Administrative Law Judge.<sup>[18]</sup>

13. On January 3, 2002, the Licensee requested a hearing to review the Administrative Penalty Order.<sup>[19]</sup>

14. At the hearing held on April 26, 2002, Mr. Wildman offered no sworn testimony to refute that of the Department and offered a single exhibit consisting of an unsworn statement of Sandy Simmons, who was not present at the hearing, stating that she "did not work for Alan Wildman or Wildman Plumbing at 7039 Columbus Ave. South."<sup>[20]</sup> Having observed the demeanor of the Department=s witnesses, who testified under oath and who were subject to cross-examination, the Administrative Law Judge found them credible and persuasive.

15. Alan Wildman has been licensed as a master plumber since 1989 and does mostly residential plumbing. He has had no prior substantiated violations or penalty orders.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Minnesota Department of Health and the Administrative Law Judge have jurisdiction in this matter under Minnesota Statutes Sections 14.50 and 144.99.

2. The Notice of and Order for Hearing was proper and the Department has complied with all relevant substantive and procedural requirements of law or rule.

3. The Department has the burden of proving by a preponderance of the evidence that the Licensee committed a violation of rule or statute.

4. The Administrative Law Judge may recommend a change in the amount of the proposed penalty but only if the judge determines that the amount of the penalty is unreasonable considering the statutory factors.<sup>[21]</sup>

5. In determining the amount of a penalty under Section 144.99, subd. 4, the Commissioner may consider:

- (1) The willfulness of the violation;
- (2) The gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the State;
- (3) The history of past violations;
- (4) The number of violations;
- (5) The economic benefit gained by the person by allowing or committing the violation; and
- (6) Other factors as justice may require, if the Commissioner specifically identifies additional factors in the Commissioner's Order.<sup>[22]</sup>

6. Minnesota Rule 4715.0870 provides in part as follows:

The bottom of the floor flange shall be set on the top of the finished floor or on a structurally firm base.

7. The Licensee did not set the bottom of the floor flange on top of the finished floor or on a structurally firm base.

8. Minnesota Rule 4715.0920 provides in part as follows:

All fixture traps, except as otherwise provided in this code, shall be protected against siphonage and back pressure by means of a properly installed vent pipe. The vent shall be so located that the developed length from the fixture trap to the vent shall not exceed the distance given in part 4715.2620, subpart 4.

9. The Licensee did not protect the traps for the basement kitchen sink, lavatory whirlpool tub and water closet against siphonage and back pressure by means of properly installed vent pipes.

10. Minnesota Rule 4715.1000 provides in part as follows:

A cleanout which is easily accessible shall be provided at or near the foot of each vertical soil or waste stack and each vertical storm water leader.

11. The Licensee did not install a cleanout at the base of the existing soil stack which was easily accessible.

12. Minnesota Rule 4715.1730, subpt. 1, provides in part as follows:

In single-family dwelling units, not more than three fixtures located in the same room may be supplied by a one-half inch size pipe.

13. The Licensee supplied four plumbing fixtures by a one-half inch size potable water distribution pipe.

14. Minnesota Rule 4715.2420, subpt. 1, provides in part as follows:

No fixture connection shall be made to a closet bend.

15. The Licensee installed a 1/4 bend drainage fitting under the flange which was a heel inlet type.

16. Minnesota Rule 4715.2830 provides in part as follows:

No building drainage or plumbing system or part thereof shall be covered until it has been inspected, tested, and approved as herein prescribed.

17. In addition, Minnesota Rule 4715.2800 provides:

New plumbing systems and parts of existing systems which have been altered, extended, or repaired shall be inspected and tested by the proper administrative authority to ensure compliance with all the requirements of this code and the installation and construction of the system in accordance with the approved plan and the permit, except that testing may be waived for work which does not include addition to, replacement, alteration, or relocation of any water supply, drainage, or vent piping.

All the piping shall be tested and after the plumbing fixtures have been set, and before the system is put into use, the system shall be given a final inspection and test by the proper administrative authority.

18. The Licensee did not request an inspection or provide for an air test prior to covering.

19. Minnesota Statutes section 326.401, subd. 1, provides as follows:

A plumber's apprentice must be registered with the commissioner of health on a registration application form supplied by the commissioner showing the date of beginning training, age, schooling, previous

experience, employer, and other information required by the commissioner.

20. The Licensee utilized, supervised and directed Alan Wildman Jr., Sandy Simmons and, likely, Larry Jacques in the performance of the plumbing work under the contract with the homeowner. None were registered as plumber's apprentices with the Commissioner of Health.

21. The Commissioner has authority to assess monetary penalties for violations of statutes or rules, the maximum amount of a penalty is \$10,000.00 for each violator for all violations identified in an inspection. Penalties may be forgiven if an acceptable correction plan is developed unless the violations are repeated or serious. Serious penalties may be nonrefundable.<sup>[23]</sup>

22. The \$3,000 refundable penalty and the \$1,500 nonrefundable penalty assessed by the Department are reasonable when considering all of the statutory factors.

23. The memorandum that follows further explains the reasons for these conclusions and the Administrative Law Judge therefore incorporates the memorandum into these conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Health affirm the Combination Administrative Penalty Order issued to Alan L. Wildman.

Dated this 15th day of May 2002.

/s/ William J. Keppel

WILLIAM J. KEPPEL  
Administrative Law Judge

Reported: Tape recorded (3 tapes);  
No Transcript Prepared.

#### NOTICE

Under Minnesota law<sup>[24]</sup> the Commissioner of Health is required to serve her final decision upon each party and the Administrative Law Judge by first class mail.

#### MEMORANDUM

The Department has proven by a preponderance of the evidence that the Licensee violated its Rules and Minnesota Statutes. The Department satisfied its

burden by calling five witnesses and offering 26 exhibits, including affidavits and a dozen photographs. The Licensee requested, and I granted over the Department's objection, that the witnesses who were not Department employees be sequestered. Nonetheless, their testimony was consistent and collaborating. I also observed the demeanor of all of the Department's witnesses, and I found them credible and persuasive.

The Licensee failed to present any witnesses, including himself, in an effort to refute or contradict any of the evidence relating to the alleged violations or the determination of penalties. The Licensee's only evidence was an unsworn statement by Sandy Simmons who stated that she "did not work for Alan Wildman." Over the Department's objection, I received the exhibit while pointing out to Mr. Wildman that it was unsworn, hearsay, not subject to cross-examination, and contradicted by several live witnesses. I reminded Mr. Wildman that the Notice and Order for Hearing provided for the issuance of subpoenas to compel the attendance of reluctant witnesses, and I offered to take a break so he could contact any potential witnesses. He declined. After the Department rested its case, Mr. Wildman declined to make an opening statement or to testify under oath. I pointed out that this left the Department's evidence virtually un rebutted. He stated that he would rely upon his cross-examination of the Department's witnesses and his closing statement. I pointed out to Mr. Wildman that a closing statement is not evidence but merely summation or argument. He proceeded with his closing.

The gist of Mr. Wildman's arguments is that he was not the plumber on this project; he has no employees; and he was never paid anything. The un rebutted evidence in the hearing record established that Mr. Wildman signed a contract to perform the plumbing services at issue in this proceeding; he showed up at the site with two assistants and did undertake those services; he directed and supervised his assistants; he was paid the full contract amount (plus \$50 for an additional item); he didn't finish the job after he was paid; his work resulted in a number of violations of the Plumbing Code; he refused to take responsibility for the violations; and the work remains uncompleted today.

Considering the evidence in the record of this hearing in light of each of the statutory factors to be used in assessing penalties, as well as the Department's manual as it applies to penalty calculations, the Administrative Law Judge concludes that the amount of the combined penalties assessed by the Department is reasonable.

W.J.K.

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<sup>[1]</sup> Ex. 3.

<sup>[2]</sup> Ex. 3, 5, 6, 7.

<sup>[3]</sup> Ex. 3, 5, 6, 13, 16.



[\[4\]](#) Ex. 5, 6, 7.

[\[5\]](#) Ex. 3, 5, 6.

[\[6\]](#) Ex. 3.

[\[7\]](#) Ex. 8, 10, 11.

[\[8\]](#) Ex. 26.

[\[9\]](#) Ex. 11.

[\[10\]](#) Ex. 12.

[\[11\]](#) Ex. 17.

[\[12\]](#) Ex. 18.

[\[13\]](#) Ex. 19.

[\[14\]](#) Ex. 20.

[\[15\]](#) Ex. 22.

[\[16\]](#) Ex. 21.

[\[17\]](#) Ex. 21, pp. 14-15.

[\[18\]](#) Ex. 23.

[\[19\]](#) Ex. 24.

[\[20\]](#) Resp. Ex. A.

[\[21\]](#) Minn. Stat. ' 144.991, subd. 5(c).

[\[22\]](#) Minn. Stat. ' 144.991, subd. 1(a).

[\[23\]](#) Minn. Stat. ' 144.99, subd. 4.

[\[24\]](#) Minn. Stat. ' 14.62 subd. 1.